84-1372 (1)

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FILED
FEB 25 1985
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM 1984

No. _____

In re:

ELMER H. THOMASSEN, a/k/a
ELMER THOMASSEN, d/b/a
ELMER H. THOMASSEN, M.D.;
and JOAN THOMASSEN,

Debtors.

ELMER H. THOMASSEN and
JOAN THOMASSEN,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

I. WHETHER THE U.S. COURT OF APPEALS ERRED IN INTERPRETING RULE 8015 OF THE BANKRUPTCY RULES, EFFECTIVE AUGUST 1, 1983, TO IMPLY THAT THE FILING OF A MOTION FOR REHEARING DOES NOT TOLL THE TIME FOR TAKING AN APPEAL FROM THE BANKRUPTCY APPELLATE PANELS TO THE COURT OF APPEALS.

II. WHETHER BANKRUPTCY RULE 8015 VIOLATES DUE PROCESS IF IT IS CONSTRUED TO IMPLY THAT THE FILING OF A MOTION FOR REHEARING DOES NOT TOLL THE TIME FOR TAKING AN APPEAL FROM THE BANKRUPTCY APPELLATE PANELS TO THE COURT OF APPEALS.

III. WHETHER IT IS A VIOLATION OF DUE PROCESS TO REQUIRE APPELLANT TO WAIVE AN APPEAL IN ORDER TO FILE A MOTION FOR RE-HEARING IN THE BANKRUPTCY APPELLATE PANELS OR VICE VERSA, IN VIOLATION OF THE FIFTH AMENDMENT TO THE U.S. CONSTITUTION.

IV. WHETHER THE COURT OF APPEALS MAY CONSTRUE A BANKRUPTCY RULE IN SUCH A WAY THAT IT RESULTS IN AN ABSURD CONCLUSION.

V. WHETHER AN APPELLANT SHOULD FOLLOW THE FEDERAL RULES OF APPELLATE PROCEDURE WHEN THE BANKRUPTCY RULES REGARDING APPELLATE PROCEDURE FROM THE BANKRUPTCY APPELLATE PANELS ARE SILENT ON A PARTICULAR AREA OF PROCEDURE.

VI. WHETHER AN APPELLATE RULE PROVIDING FOR A MOTION FOR REHEARING IMPLIES THE TOLLING OF THE TIME WITHIN WHICH TO TAKE AN APPEAL TO THE COURT OF APPEALS.

INDEX

Questions Presented.....i

Index.....iii

Table of Authorities.....iv

Petition for Writ of Certiorari.....1

Opinions Below.....1

Jurisdiction.....2

Primary Constitutional Provisions & Statutes & Rules Involved.....3

Statement of the Case.....6

Reasons for Granting the Writ.....11
A.....11
B.....22

Conclusion.....28

Appendix.....A-1

Order entered 8-3-82 granting Relief from Automatic Stay.....A-1

Order entered 12-27-83 dismissing Appeal.....A-4

Order entered 2-21-84 denying Motion for Reconsideration.....A-6

Order entered 11-26-84 dismissing Appeal.....A-8

Affidavit of Jeanene Moenckmeier in support of Petition for Writ of Certiorari.....A-9

TABLE OF AUTHORITIES

CASES

In re Burley, 738 F.2d 981 (1984).....13

Cel-A-Pak v. Calif. Labor Relations Bd., 680 F.2d 664 (1982),cert. denied 459 U.S. 1071 (1982).....24,25,A-8

Crateo, Inc. v. Intermark, Inc. 536 F.2d 862 (9th Cir.1976).....24

U.S. v. Kirby, 74 U.S. 482 (1868).....22

Lanzetta v. N.J.,306 U.S. 451 (1939)....23

Long v. Bureau of Economic Analysis, 646 F.2d 1310 (9th Cir. 1981), vacated on other grounds, 454 U.S. 934, 102 S.Ct. 468, 70 L.Ed.2d 242 (1981).....24

Papachristou v. Jacksonville, 405 U.S. 156 (1972).....23

Smith v. Lujan, 588 F.2d 1304 (9th Cir. 1979).....24

MISCELLANEOUS

Mr. Justice Black, United States Supreme Court, 346 U.S. 946 (1954).....27

CONSTITUTIONAL PROVISIONS

Constitution of the United States

Amendment V.....i,3

STATUTES

Title 11, United States Code

§362(a).....6
§362(d).....A-2

Title 28, United States Code

§160.....5,13
§1254.....1
§1254(1).....2
§2107.....A-8

FEDERAL RULES

Federal Rules of Appellate Procedure

Rule 3.....18
Rule 4.....10,14,15,16,18,A-12
Rule 4(a)(4).....3,16
Rule 40..... 4,21
Rule 40(a).....21
Rule 41.....4,10,14,16,21,A-21

Federal Rules of Civil Procedure

Rule 59..... 3,16,17,18,20
Rule 60(b).....24

BANKRUPTCY RULES

Interim Rules

Rule 8006.....5,18

BANKRUPTCY RULES (continued)

Bankruptcy Rules effective 10-1-73
as amended 3-15-77

Rule 801.....18
Rule 802.....18
Rule 812.....19,20,21,25
Rule 923.....16,17,18

Bankruptcy Rules, effective 8-1-83

Rule 8002.....18
Rule 8015.....4,9,11,19,22,23,25,28
Rule 9023.....16,17

Local Bankruptcy Rules for the U.S.
Bankruptcy Appellate Panels for
the Ninth Circuit

Rule 8006..... 5,18

PETITION FOR WRIT OF CERTIORARI

The petitioners ELMER H. THOMASSEN and JOAN THOMASSEN, pray that a writ of certiorari issue to review the final order of the United States Court of Appeals for the Ninth Circuit, rendered November 26, 1984 dismissing the appeal below for lack of jurisdiction. The order is set forth in the appendix at A-8. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

OPINIONS BELOW

Ninth Ciruit. There was no formal opinion rendered by the U.S. Court of Appeals for the Ninth Circuit. The order entered was as follows: Order entered November 26, 1984 dismissing the appeal below (Appendix at A-8)

Bankruptcy Appellate Panels. Order entered December 27, 1983 dismissing the appeal below (Appendix at A-4) and the order of

the same date denying appellants' motions to excuse the untimely filing of the opening brief and extensions of time to file said opening brief. Order of February 21, 1984 denying appellants' motion to reconsider its orders of December 27, 1983 and order assessing attorneys' fees to appellee. (Appendix at A-6).

Bankruptcy Court. There was no formal opinion rendered in the Bankruptcy Court below; however, the Order Granting Relief from Automatic Stay, entered August 3, 1982 may be found at Appendix at A-1.

JURISDICTION

The order dismissing the appeal below in the Ninth Circuit was entered November 26, 1984. The jurisdiction of the Court is invoked under 28 U.S.C.1254(1).

PRIMARY CONSTITUTIONAL PROVISIONS & STATUTES & RULES INVOLVED

Constitution of the United States,

Amendment V:

> No person...nor shall be deprived of life, liberty or property, without due process of law;

Federal Rules of Appellate Procedure

Rule 4(a)(4)

> If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motions is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion

as provided above. No additional fees shall be required for such filing.

Rule 40. Petition for Rehearing

(a) Time for Filing; Content; Answer; Action by Court if Granted.

A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order or by local rule.....

Rule 41. Issuance of Mandate; Stay of Mandate

(a) Date of Issuance. The mandate of the court shall issue 21 days after the entry of judgment unless the time is shortened or enlarged by order....
The timely filing of a petition for rehearing will stay the mandate until disposition of the petition unless otherwise ordered by the court. If the petition is denied, the mandate shall issue 7 days after entry of the order denying the petition unless the time is shortened or enlarged by order.

Bankruptcy Rule 8015, effective 8-1-83

Motion for Rehearing. Unless the district court or the bankruptcy appellate panel by local rule or by order otherwise provides, a motion for rehearing may be filed within 10 days after entry of the

judgment of the district court or the bankruptcy appellate panel.

Title 28, United States Code, Section 160

(a) If the circuit council of a circuit orders application of this section to a district within such circuit, the chief judge of each circuit shall designate panels of three bankruptcy judges to hear appeals from judgments, orders, and decrees of the bankruptcy court of the United States for such district. Except as provided in section 293(e) of this title, a panel shall be composed only of bankruptcy judges for districts located in the circuit in which the appeal arises. The chief judge shall designate a sufficient number of such panels so that appeals may be heard and disposed of expeditiously.

Local Rules, Bankruptcy Appellate Panels of the Ninth Circuit.

Rule 8006. Finality of Bankruptcy Judge's Judgment or Order. Unless notice of appeal is filed as prescribed by Rules 801 and 802 of the Bankruptcy Rules or Rules 3 and 4 of the Federal Rules of Appellate Procedure, the judgment or order of the bankruptcy judge shall become final.

STATEMENT OF THE CASE

Petitioners are debtors in a Chapter 7 proceeding in U.S. Bankruptcy Court for the Central District of California in Santa Ana, Case No. SA-80-00215AP. On August 3, 1982, the United States Bankruptcy Court for the Central District of California in Santa Ana, entered an order granting relief to the Respondent United States of America from the Title 11, U.S.C. §362(a) Automatic Stay. (Order at A-1). This Relief from Automatic Stay allowed the United States to execute against the petitioners' real properties including their residence and the order further stated that the real properties were not assets of the estate and that there never had been a stay in effect with regard to the six real properties and the two civil actions against the petitioners/debtors. Respondent has not yet sold petitioners'

residence but threatens to do so soon.

Petitioners/debtors filed a Notice of Appeal to the U.S. Bankruptcy Appellate Panels of the Ninth Circuit on August 13, 1982. Petitioners had filed their appeal in propria persona. One June 3, 1983 Jeanene Moenckmeier entered her appearance as attorney of record on behalf of the appellants. The certificate of readiness was filed on June 6, 1983.

Petitioners filed a Motion for an Order excusing the late filing of the opening Brief and a Motion for Extension of time to file Opening Brief until September 23, 1983. Petitioners filed their Second Motion for Extension of time to file Opening Brief on October 17, 1983 at the same time that they filed the Opening Brief. No order was entered during this time either granting or denying the first and second request for extension of time.

On November 1, 1983, six weeks after petitioners filed their first motion for extension of time, respondent filed an untimely opposition to Motions for extensions of time to file Opening Brief.

After a very long delay, on December 27, 1983, the United States Bankruptcy Appellate Panels below entered an Order denying petitioners' motions for an Order excusing the late filing of the Opening Brief and denying the Motions for extensions of time to file Opening Brief and dismissed the appeal. (Order at A-4)

On January 6, 1984 petitioners filed a Motion for Reconsideration of the Order denying appellants motions and dismissing the appeal and filed supplement thereto on January 17, 1984. On February 21, 1984 the Bankruptcy Appellate Panels entered an Order denying petitioners' motion for reconsideration [rehearing] and awarded respondent attorneys' fees in the amount

of five hundred dollars (Order at A-6)

On April 19, 1984 petitioners filed a Notice of Appeal to the Ninth Circuit Court of Appeals from the final Orders of the Bankruptcy Appellate Panels entered December 27, 1983 and February 21, 1984. This was within 60 days of the denial of motion for reconsideration [rehearing] pursuant to Bankruptcy Rule 8015 of the Bankruptcy Rules of Practice and Procedure.

On November 26, 1984, after all briefs had been filed, including reply brief, the United States Court of Appeals for the Ninth Circuit dismissed petitioners' appeal for lack of jurisdiction after respondent argued in its brief that Rule 8015 of the Bankruptcy Rules of Practice and Procedure does not provide for the tolling of the time for appeal during the pending motion for rehearing. (Order at A-8)

Petitioners were pro se before the U.S. Court of Appeals for the Ninth Circuit. When they filed their Notice of Appeal subsequent to the Motion for Rehearing, they relied on Rule 4 and 41 of the Federal Rules of Appellate Procedure in counting the time to file Notice of Appeal. They inquired of their previous attorney concerning the timeliness. Their previous attorney relied on the practice in the Ninth Circuit of relying on the Federal Rules of Appellate Procedure when the Bankruptcy Rules regarding appeals are silent as in the case herein. Appellants' attorney relied on the Federal Rules of Appellate procedure only after making numerous inquires of both the Bankruptcy Appellate Panels and the Ninth Circuit as to which Rule applies for timeliness of notice of appeal. Please see affidavit of Jeanene Moenckmeier filed with this Court and attached hereto at A-9.

REASONS FOR GRANTING THE WRIT

THE UNITED STATES COURT OF APPEALS IN ITS DECISION BELOW HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL RULES WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT, AND THE STATUTORY CONSTRUCTION WHICH THE COURT OF APPEALS HAS APPLIED HAS CAUSED AN ABSURD INTERPRETATION OF A FEDERAL RULE, IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT

A. To interpret the silence in Rule 8015 of the Bankruptcy Rules of Practice and Procedure, effective August 1, 1983, to imply that the filing of a motion for rehearing does not toll the time for taking an appeal from the Bankruptcy Appellate Panels to the Court of Appeals is a violation of due process and is unconstitutional.

When the Bankruptcy Rules are confusing, contradictory or silent, the Federal Rules of Appellate Procedure should apply for appeals from the United States Bankruptcy Appellate Panels for the Ninth Circuit to the U.S. Court of Appeals for the Ninth Circuit.

The Bankruptcy Rules of Practice and Procedure prior to August 1, 1983 and those rules effective August 1, 1983, the Interim Rules of Bankruptcy Procedure, and the Rules of the United States Bankruptcy Appellate Panels of the Ninth Cirucit are confusing, ambiguous, contradictory and silent on some provisions of appeal. When the Bankruptcy Rules are not clear as to the meaning of the rule, the court should look to the Federal Rules of Appellate Procedure for guidance as to the meaning of the rule and where a provision is silent on an appeal to the United States Court of Appeal, the Federal Rules of

Appellate Procedure should be followed. This is currently the practice of the U.S. Court of Appeals for the Ninth Circuit.

It is particularly understandable that at party would look to the Federal Rules of Appellate Procedure when a Bankruptcy Rule of Practice and Procedure is silent, since the "court of appeals also retains control over the Bankruptcy Appellate Panels in that the Bankruptcy Appellate Panels can only be established by order of the circuit council." See 28 U.S.C.§160 and In re Burley, 738 F.2d 981, 986(1984)

The Bankruptcy Rules in effect at the time appellants filed their notice of appeal were confusing, ambiguous, contradictory and silent as to the precise timing of the notice of appeal after the filing of a motion for reconsideration [or motion for rehearing] in the United States Bankruptcy Appellate Panels of the

Ninth Circuit. Therefore, petitioners justifiably relied on the Federal Rules of Appellate Procedure, Rules 4 and 41 in calculating the time for filing their notice of appeal to the Ninth Circuit.

Petitioners appeared in the appeal below in the United States Court of Appeals for the Ninth Circuit pro se; however, in an endeavor to determine the timeliness of their appeal to this Court they requested that their previous attorney Jeanene Moenckmeier inquire of both the Bankruptcy Appellate Panels and the United States Court of Appeals for the Ninth Circuit to determine which of the rules applied to the timeliness of a notice of appeal from the United States Bankruptcy Appellate Panels for the Ninth Circuit to the United States Court of Appeals for the Ninth Circuit if a motion for reconsideration [rehearing] is timely filed in the Bankruptcy Appellate

Panels with regard to a denial of a motion and with regard to the dismissal of the appeal. The appellants' attorney Jeanene Moenckmeier inquired of the Clerk's office of the Bankruptcy Appellate Panels and the legal department of the United States Court of Appeals for the Ninth Circuit. The Bankruptcy Appellate Panels informed Jeanene Moenckmeier that when the Bankruptcy Appellate Panels rules are silent one must look to the Rules of Bankruptcy Procedure. If the Rules of Bankruptcy Procedure are silent as to a particular procedure on appeal one then must turn to the Federal Rules of Appellate Procedure for procedure on appeal. When Jeanene Moenckmeier inquired of the legal department of the United States Court of Appeals for the Ninth Circuit, she was directed from one staff attorney to another until she was directed to seek the answer in Rule 4 of the Federal Rules of Appellate

Procedure.

Based on the information provided by both the Bankruptcy Appellate Panels and the Ninth Circuit, the appellants relied on Rule 4 of the Federal Rules of Appellate Procedure for the timing for the notice of appeal after a motion for reconsideration [rehearing] as in Rule 59 of the Federal Rules of Civil Procedure or Bankruptcy Rule 923 and 9023. Appellants further relied on Rule 41, Federal Rules of Civil Procedure for the tolling of the time for filing the notice of appeal.

Rule 4(a)(4) of the Federal Rules of Appellate Procedure provides that when a timely motion under Rule 59 of the Federal Rules of Civil Procedure (applicable to the Bankruptcy Court through Bankruptcy Rule 923 and 9023) to alter or amend judgment or for a new trial, the time for appeal shall run from the entry

of the order denying the new trial or granting or denying any other such motion.

Appellants' timely motion for reconsideration [rehearing] in the Bankruptcy Appellate Panels should have tolled the time for filing a notice of appeal to the United States Court of Appeals for the Ninth Circuit as a motion under Rule 59, Federal Rules of Civil Procedure (or Bankruptcy Rule 923 and 9023) for an appeal to the Ninth Circuit from district court.

Whether the motion was designated as "motion for reconsideration" or "motion for rehearing" does not alter the fact that the motion is a request to alter or amend the judgment or order or request a new trial, which is comparable to a Rule 59 motion in district court. The Rules of Bankruptcy Procedure in effect prior to Aug. 1, 1983 provided for Rule 59 motions in

Bankruptcy Court pursuant to Rule 923. The new Bankruptcy Rules, effective August 1, 1983 also provide for Rule 59 motions and that said motions extend the time to file the notice of appeal pursuant to new Rule 8002. The Interim Rules referred to Bankrptcy rules 802 which also provided that Rule 59 motions (Bankruptcy Rule 923) tolled the time for filing notice of appeal.

Interim Bankruptcy Rule 8006 provided that notices of appeal were to be filed either as prescribed by Rules 801 and 802 of the Bankruptcy Rules or Rules 3 and 4 of the Federal Rules of Appellate Procedure. The identical Rule appears in the Rules for the United States Bankruptcy Appellate Panels of the Ninth Circuit as Rule 8006. These rules give added grounds for relying on the Federal Rules of Appellate Procedure when the Bankruptcy Rules regarding appellate procedure are silent. In rules

8006 both court rules are mentioned, implying that in some circumstances, the Bankruptcy Rules and in other circumstances, the Rules of Appellate Procedure apply.

Throughout the Bankruptcy Rules regarding appeals, the Advisory Committee's Notes explain that the Bankruptcy Rules for appeal are adapted from the Federal Rules of Appellate Procedure and repeatedly they use such terms as "analogous" to the Rule____ of the Federal Rules of Appellate Procedure. What more reason could there be for relying on the Federal Rules of Appellate Procedure when the Bankruptcy Rules are silent when even the Advisory Committee relied on the Federal Rules of Appellate Procedure in adapting the Bankruptcy Rules for appeal.

Bankruptcy Rule 812, Motion for Rehearing, and New Bankruptcy Rule 8015, effective August 1, 1983 provide that a

motion for rehearing is permitted provided it is filed within ten days of the entry of judgment. Appellants' motion for rehearing was timely filed on January 6, 1984. Although said motion was designated "motion for reconsideration" it can also be considered a motion for rehearing since a motion for rehearing serves the same purpose as a Rule 59 motion. It requests the Court to hear something again as a new trial or reconsider its previous order or judgment and then amend or vacate it.

The Bankruptcy Rules related to appeals, including the rules of the United States Bankruptcy Appellate Panels of the Ninth Circuit are silent on whether the motion for rehearing tolls the time for filing a notice of appeal to the Ninth Circuit. Although the Advisory Committee's Note for Bankruptcy Rule 812 (Motion for Rehearing) and New Bankruptcy Rule 8015, effective August 1, 1983 suggest that

filing a motion for rehearing does not toll the time for filing a notice of appeal, the Note also indicates that these Rules are adaptations of Rule 40(a) of the Federal Rules of Appellate Procedure.

An Advisory Committee's Note is not a Rule and is only advisory. A Rule that is not clear on its face must be construed to make sense. Rules 812 and New Rule 8015 are not clear on their face and therefore since the Rules are adapted from the Federal Rules of Appellate Procedure, it follows that one should look to the Federal Rules of Appellate Procedure for guidance. The Rules of Bankruptcy Appellate Panels of the Ninth Circuit are silent as to motions for rehearing. Rule 40 of the Federal Rules of Appellate Procedure provides for the filing of a motion for rehearing and Rule 41 of the Federal Rules of Appellate Procedure provides for the tolling of the time to

appeal when a timely motion for rehearing is filed.

B. Rule 8015 of the Bankruptcy Rules must be construed so as to avoid an absurd conclusion . To interpret Rule 8015 to imply that a motion for rehearing does not toll the time for taking an appeal from the Bankruptcy Appellate Panels to the Court of Appeals would give an absurd contradictory result and violate due process

In U.S. v. Kirby, 74 U.S. 482, 486,487 (1868) this Court enunciated a cardinal rule of statutory construction. Statutes are to be construed so as to avoid an absurd conclusions. The above cardinal rule should also be applied to the Bankruptcy Rule herein, 8015, so as not to obtain an absurd conclusion.

Further, the confusion and vagueness resulting from the silence of Rule 8015 as to the timely filing of a notice of appeal deprives the appellant of due process in violation of his constiutional rights if the Rule is construed to imply that the motion for rehearing does not toll the time for filing a notice of appeal to the Court of appeals. Papachristou v. Jacksonville, 405 U.S. 156 (1972); Lanzetta v. N.J., 306 U.S. 451 (1939).

If the Court construes the silence in Rule 8015 to imply that the filing of a motion for rehearing does not toll the time within which to file a notice of appeal, the absurd conclusion would result that the appellant is forced to make a decision upon filing a motion for rehearing to waive his right to appeal or waive his right to a rehearing. This is necessary because if the Court in deciding the motion for rehearing exceeds the time for filing

a notice of appeal, the appellant must waive his appeal to have the motion heard. Filing a notice of appeal while a motion for rehearing is pending would divest the Bankruptcy Appellate Panels of jurisdiction and prevent it from acting on the motion. The Ninth Circuit in a recent case restated in dicta its previous holding that "Appellant could not take an appeal and at the same time obtain a rehearing by the district court since an effective notice of appeal would divest the district court of jurisidction and prevent it from acting upon the the Rule 60(b) motion. Cel-A-Pak v. Calif. Labor Relations Board, 680 F.2d 664,667 (1982), citing Long v. Bureau of Economic Analysis, 646 F.2d 1310,1318 (9th Cir.1981), vacated on other grounds, 454 U.S. 934, 102 S.Ct. 468, 70 L.Ed.2d 242 (1981); Smith v. Lujan, 588 F.2d 1304,1307 (9th Cir.1979); Crateo, Inc. v. Intermark, Inc., 536 F.2d 862,869 (9th Cir.1976).

The Ninth Circuit, in the case herein used the same case, Cel-A-Pak v. Calif. Labor Relations Bd., supra. as a ground for dismissing petitioners' appeal below for lack of jurisdiction because a Rule 8015 motion for rehearing supposedly does not toll the time to file a notice of appeal. Then at the same time it rules that a motion for rehearing and a notice of appeal cannot be filed at the same time. It would follow then that a notice of appeal would have to be filed after the motion for rehearing is decided. This would make a motion for rehearing impossible to obtain. This rationale is contradictory and violates due process.

The only logical construction of Bankruptcy Rules 812 and 8015 is to imply that the motion for rehearing (or reconsideration in this case) in the Bankruptcy Appellate Panels tolls the time for filing

a notice of appeal as it does in Rule 41 of the Federal Rules of Appellate Procedure. If this were not the case, unnecessary appeals would be filed in the United States Court of Appeals for the Ninth Circuit and those appeals would divest the Bankruptcy Appellate Panels of jurisdiction to rule on the motions for rehearing. Also, if a notice of appeal were filed timely while the motion for rehearing was pending and the court below had decided to grant the motion for rehearing, there would be an appeal in the Court of Appeals which could have been avoided, creating a waste of judicial time and a waste of time and money for the appellant.

The only logical construction of Rules 812 and 8015 is to imply a tolling of the time for filing a notice of appeal. This Court should disregard the Advisory Committee's Notes which are not Rules and

construe the Rules in question to include a tolling of the time for notice of appeal which is the only logical common sense construction.

Mr. Justice Black of the United States Supreme Court observed in another context:

> The principal function of procedural rules should be to serve as useful guides to help, not hinder, persons who have a legal right to bring their problems before the courts. 346 U.S. 946 (1954).

Although the above statement was not made regarding the Bankruptcy Rules it was made upon the adoption of the revised Federal Rules of Civil Procedure. The statement would be just as applicable to the Bankruptcy Rules.

CONCLUSION

It is respectfully submitted that this petition for certiorari should be granted in order to permit the Supreme Court to interpret the Bankruptcy Rule 8015 so as not to cause an absurd result and thereby violate petitioners' due process rights.

After construing Rule 8015, petitioners pray that this Court reinstate the appeal below.

February 25, 1985

Respectfully submitted,

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ORIGINAL

FILED
AUG 3-1982
CLERK, U.S. BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
BY BANRKUPTCY CLERK

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

In re	BK 80-00215-AP
ELMER H. THOMASSEN, aka ELMER THOMASSEN, DBA ELMER H. THOMASSEN, M.D., and JOAN THOMASSEN, Debtors.	Adv. SA82-1104 ORDER GRANTING RELIEF FROM AUTOMATIC STAY
UNITED STATES OF AMERICA, Plaintiff, v. ELMER H. THOMASSEN and JOAN THOMASSEN, Defendants.	

The above matter came on for hearing before the Court, the Honorable Aaron K.

Phelps presiding, on July 16, 1982. The plaintiff was represented by Assistant United States Attorney William J. James and the debtors, Elmer H. Thomassen and Joan Thomassen, appeared in propria persona.

Having viewed and considered the Complaint for Relief from Automatic Stay filed by the United States and the Anser thereto filed by the defendant debtors, having heard and considered the arguments advanced at the above hearing, and based upon the record of this bankruptcy proceeding,

IT IS HEREBY ORDERED that the United States is relieved from the provisions of the automatic stay contained in 11 U.S.C. §362(d) with respect to the Complaint which it has filed against the debtors and others in the United States District Court for the District of Nebraska, United States v. Elmer Thomassen, et al., No. CV78-1731-R, are not assets of the bankruptcy estate,

and that the government should not be barred from pursuing its remedies in either case, and no stay is now or ever has been in existence.

DATED: AUG 3-1982

/s/ A.K. Phelps
AARON K. PHELPS
UNITED STATES BANKRUPTCY JUDGE

PRESENTED BY:

STEPHEN S. TROTT
United States Attorney
CHARLES H. MAGNUSON
Assistant United States Attorney
Chief, Tax Division

/s/ William J. James
WILLIAM J. JAMES
Assistant United States Attorney
Attorneys for United States of America

UNITED STATES BANKRUPTCY APPELLATE PANELS
OF THE NINTH CIRCUIT

In re:	)	FILED
	)	DEC 27 1983
ELMER H. THOMASSEN, aka	)	
ELMER THOMASSEN, dba	)	CLERK, U.S.BKCY
ELMER H. THOMASSEN, M.D.,	)	APP. PANELS OF
and JOAN THOMASSEN,	)	THE NINTH CIR.
	)	
Debtors.	)	BAP No. CC-82
UNITED STATES OF AMERICA,	)	1340
	)	
Appellee,	)	ORDER DISMIS-
v.	)	
	)	SING APPEAL
ELMER H. THOMASSEN and	)	
JOAN THOMASSEN,	)	
	)	
Appellants.	)	

Before: GEORGE and VOLINN, Bankruptcy Judges

This Panel, having considered the Motion of appellants' Elmer H. Thomassen and Joan Thomassen, For an Order Excusing Appellants From Failing To Timely File An Opening Brief and the Motions of appellants for Extensions Of Time to File their Opening Brief, and having considered the Opposition thereto filed by the appellee, United States of America, It is hereby

ORDERED, that appellants' Motion for an Order Excusing Deficiency and Motions for Extensions of Time are DENIED; the appellants having not shown sufficient grounds to this Panel for said Motions to be granted.

UNITED STATES BANKRUPTCY APPELLATE PANELS
OF THE NINTH CIRCUIT

FILED FEB 21 1984
CLERK U.S. BNCY.APP.
PANELS OF THE NINTH CIR.

In re	
ELMER H. THOMASSEN, a/k/a ELMER THOMASSEN, d/b/a ELMER H. THOMASSEN, M.D.; and JOAN THOMASSEN, Debtors.	BAP No. CC-82-1340 Bankruptcy No. 80-00215-AP
UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. ELMER H. THOMASSEN and JOAN THOMASSEN, Defendants-Appellants.	Advsary No. SA 82-1104 O R D E R

Before: GEORGE and VOLINN, Bankruptcy Judges

This panel having considered the MOTION FOR RECONSIDERATION OF ORDER ENTERED DECEMBER 27, 1983 DENYING APPELLANTS MOTIONS FOR AN ORDER EXCUSING APPELLANTS FROM FAILING TO TIMELY FILE THE OPENING BRIEF, MOTIONS FOR AN ORDER EXTENDING TIME WITHIN TO FILE THE OPENING BRIEF; AND RECONSIDERATION OF THE ORDER DISMISSING THE APPEAL HEREIN, filed herein

by the above-named defendants/appellants on January 6, 1984; and having considered the various declarations and exhibits filed therewith; and having considered the opposition thereto, filed herein by the plaintiff/appellee on February 10, 1984; the panel finding nothing in the defendants/appellants' motion which could not have been presented to the panel prior to the entry of its December 27, 1983 order; the panel further finding nothing therein which would support a vacation of said order; and other good cause appearing therefor; It is hereby

ORDERED that the said motion be DENIED; And, it is further

ORDERED that attorneys' fees in the amount of $500.00 be taxed against the above-named defendants/appellants and in favor of the above-named plaintiff/appellee.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
NOV 26 1984
PHILLIP B. WINBERRY
CLERK, U.S. COURT
OF APPEALS

In the Matter of:

ELMER H. THOMASSEN, a/k/a ELMER THOMASSEN, d/b/a ELMER H. THOMASSEN, M.D., and JOAN THOMASSEN,

Debtors.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

ELMER H. THOMASSEN and JOAN THOMASSEN,

Defendants-Appellants.

No. 84-5860

BAP# CC-82-1340 G&V

ORDER

Before: ALARCON, POOLE, and BEEZER,

Circuit Judges

This appeal is dimissed for lack of jurisdiction. See 28 U.S.C.§2107; Cel-A-Pak v. California Agricultural Labor Relations Board, 680 F.2d 664 (9th Cir.), cert. denied, 459 U.S. 1071 (1982)

MoCal 11/12/84

IN THE
SUPREME COURT OF THE
UNITED STATES

In re:	
ELMER H. THOMASSEN, a/k/a ELMER THOMASSEN, d/b/a ELMER H. THOMASSEN, M.D.; and JOAN THOMASSEN, Debtors.	No. _____
ELMER H. THOMASSEN and JOAN THOMASSEN, Petitioners, vs. UNITED STATES OF AMERICA, Respondents.	AFFIDAVIT OF JEANENE MOENCKMEIER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

STATE OF MISSOURI) SS.
COUNTY OF ST. LOUIS)

I, Jeanene Moenckmeier, after being duly sworn, depose and state as follows:

1. I represented the Petitioners in the underlying Bankruptcy and before the Bankruptcy Appellate Panels of the Ninth Circuit, prior to the case being appealed to the U.S. Court of Appeals for the Ninth Circuit.

2. The Petitioners appeared pro se before the U.S. Court of Appeals for the

U.S. Court of Appeals for the Ninth Circuit, No. 84-5860.

3. On or about February 1, 1984 the appellants below inquired of me to find out what the date to file the notice of appeal from the Bankruptcy Appellate Panels to the U.S. Court of Appeals was, after the filing of a motion for reconsideration [rehearing].

4. I checked the Bankruptcy Rules of Practice and Procedure; however, I could not find a precise Rule on when the notice of appeal must be filed, when taking an appeal from the Bankruptcy Appellate Panels to the U.S. Court of Appeals for the Ninth Circuit.

5. I telephoned the Clerk's Office at the U.S. Bankruptcy Appellate Panels of the Ninth Circuit in Los Angeles to inquire further as to the timeliness of an appeal to the Ninth Circuit. I was informed by a deputy clerk that when the Bankruptcy Rules

are silent one must look to the Federal Rules of Appellate Procedure. The deputy clerk admitted that she did not know the answer and therefore suggested telephoning the U.S. Court of Appeals for the Ninth Circuit for the answer.

6. I telephoned the Clerk's office of the U.S. Court of Appeals for the Ninth Circuit on the same day as my telephone call to the Bankruptcy Appellate Panels. I was referred to the legal department of the United States Court of Appeals for the Ninth Circuit.

7. At the Ninth Circuit I was referred from one staff attorney to another until I was directed to seek the answer in Rule 4 of the Federal Rules of Appellate Procedure for the answer, for timeliness after motion for reconsideration [rehearing].

8. After inquiring with the Bankruptcy Appellate Panels and the Ninth

Circuit, I checked with Rule 4 of the Federal Rules of Appellate Procedure. I determined that the time to appeal was 60 days and since Rule 8015 of the Bankruptcy Rules of Practice and Procedure was silent as to whether the motion for reconsideration [motion for rehearing] tolled the time within which to file the notice of appeal, I assumed that Rule 4 applied and that the motion for rehearing was analogous to motion for reconsideration in Bankruptcy Court and the District Court. I further checked the Federal Rules of Appellate Procedure, Rule 41, for further guidance as to the tolling of the time to appeal after a motion for rehearing.

9. Based on the above inquiries, I informed the appellants/petitioners that they had 60 days to file a notice of appeal after the denial of a motion for reconsideration [rehearing] at the Bankruptcy Appellate Panels.

10. Based upon the above information supplied to the appellants/petitioners, appellants filed their notice of appeal to the U.S. Court of Appeals for the Ninth Circuit within 60 days of the denial of their motion for reconsideration which was denied on February 21, 1984. Their appeal was filed April 19, 1984.

11. I am a member of the Bar of the Supreme Court of the United States and of the Supreme Court of Missouri.

12. The foregoing statements of fact are true and correct and based upon my personal knowledge.

/s/Jeanene Moenckmeier
Jeanene Moenckmeier

On February 22, 1985, Jeanene Moenckmeier appeared before me and after being duly sworn stated that the foregoing statements of fact are true and correct and based upon her personal knowledge.

My commission expires: July 12,1986

/s/ Ellen L. Myers
Notary Public

Supreme Court, U.S.
FILED
JUN 6 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1372

In the Supreme Court of the United States

OCTOBER TERM, 1984

ELMER H. THOMASSEN AND JOAN THOMASSEN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
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Washington, D.C. 20530
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TABLE OF AUTHORITIES

Page

Cases:

Andrews v. *South Dakota Student Loan Association Corp.*, 636 F.2d 233 3

Browder v. *Director, Illinois Department of Corrections*, 434 U.S. 257 3

Crateo, Inc. v. *Intermark, Inc.*, 536 F.2d 862, cert. denied, 429 U.S. 896 5

Long v. *Bureau of Economic Analysis*, 646 F.2d 1310, vacated, 454 U.S. 934 5

Lovitt, In re, 757 F.2d 1035 4

Mississippi Publishing Corp. v. *Murphree*, 326 U.S. 438 4

National Union v. *Arnold*, 348 U.S. 37 4-5

Shannon, In re, 670 F.2d 904 3

United States v. *Robinson*, 361 U.S. 220 3

Statutes and rules:

Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 *et seq.* 3

§ 248, 92 Stat. 2672 3
§ 402(b), 92 Stat. 2682 3

11 U.S.C. 362(a) 2

11 U.S.C. 1101-1174 2

28 U.S.C. 2107 ..... 3, 5

28 U.S.C. (1976 ed.) 2107 3

Page

Statutes and rules—Continued:

Bankr. R. P. :

Rule 8015 ..... 3, 4
Rule 9023 4

Fed. R. App. P. 4(a)(4) .....

Fed. R. Civ. P. 59 4

Miscellaneous:

3 Sutherland, *Statutory Construction*, (4th ed. 1973) 4

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners challenge the court of appeals' dismissal of their appeal for lack of jurisdiction, a dismissal predicated on petitioners' failure to file a timely notice of appeal.

1. Petitioners have outstanding federal tax liabilities in excess of $400,000 (Bkr. CR 1, Exhs. A, B).[1] In an effort to collect these taxes, the government obtained in the United States District Court for the Central District of California a judgment setting aside as fraudulent petitioners' conveyance of certain real property. The government also brought suit in the United States District Court for the District of Nebraska, seeking to set aside as fraudulent petitioners' conveyance of another parcel of realty to their son. *Ibid.*

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[1] "Bkr. CR" refers to the docket control number assigned to documents in the original record by the clerk of the bankruptcy court. "CR" refers to the docket control numbers assigned to documents by the clerk of the bankruptcy appellate panel.

On January 30, 1980, petitioners filed a petition for a reorganization under 11 U.S.C. 1101-1174 of the Bankruptcy Code. The United States then commenced this adversary proceeding, seeking relief from the Bankruptcy Code's automatic stay provision (11 U.S.C. 362(a)) so that it might enforce the judgment it had obtained against petitioners in California and prosecute the fraudulent conveyance action it had pending against them in Nebraska. The bankruptcy court sustained the government's position and granted it the requested relief (Pet. App. A1-A3).

Petitioners appealed to the bankruptcy appellate panel of the Ninth Circuit. They failed to order a transcript and failed to file a timely statement of the issues. On June 3, 1983, some ten months after filing their notice of appeal, they sought and obtained an order excusing these failures (Bkr. CR 15, 21). They then failed to file a timely brief. On September 14, 1983, they sought an extension of time to file their brief (CR 8). They did not file a brief within the additional time they had sought. Instead, on October 17, 1983, they attached their brief to a motion for a further extension of time (CR 9). On December 27, 1983, the bankruptcy appellate panel denied petitioners' motions and dismissed their appeal (Pet. App. A4-A5).

On January 6, 1984, petitioners filed a motion for reconsideration, which they supplemented 11 days later (CR 15, 16). The bankruptcy appellate panel denied that motion on February 21, 1984, and awarded the government attorney's fees in the amount of $500 (Pet. App. A6-A7). On April 19, 1984, petitioners filed a notice of appeal to the Ninth Circuit (CR 20). Since their notice of appeal was not filed within sixty days of the date their case was dismissed by the bankruptcy appellate panel, the court of appeals, in an unpublished order, dismissed the appeal for lack of jurisdiction (Pet. App. A8).

2. The timely filing of a notice of appeal is " 'mandatory and jurisdictional.' " *Browder* v. *Director, Illinois Department of Corrections*, 434 U.S. 257, 264 (1978); *United States* v. *Robinson*, 361 U.S. 220, 224 (1960). The bankruptcy appellate panel's order dismissing petitioners' appeal was entered on December 27, 1983. Thus, under 28 U.S.C. 2107, as amended by the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 *et seq.*, petitioners were required to file their notice of appeal within 60 days of that order, that is, by February 25, 1984.[2] Since petitioners did not file their notice of appeal until April 19, 1984, the Ninth Circuit correctly dismissed their appeal for lack of jurisdiction.

Petitioners' motion for reconsideration, which in substance was a motion for rehearing, did not extend the time for filing a notice of appeal. Rule 8015 of the Rules of Bankruptcy Procedure, which became effective on August 1, 1983, authorizes the filing of a motion for rehearing within ten days after the entry of judgment. The advisory

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[2]Section 2107 of 28 U.S.C. generally provides that, in actions in which the United States is a party, a notice of appeal shall be filed within 60 days after entry of the judgment appealed from. Prior to its amendment in 1978, Section 2107 by its terms did "not apply to bankruptcy matters or other proceedings under Title 11" of the United States Code. 28 U.S.C. (1976 ed.) 2107. In the Bankruptcy Reform Act of 1978, however, Congress deleted this sentence. Pub. L. No. 95-598, Tit. II, § 248, 92 Stat. 2672. Although the amendment accomplishing the deletion was not expressly made effective until April 1, 1984 (Pub. L. No. 95-598, Tit. II, § 402(b), 92 Stat. 2682), the courts of appeals have held that Congress's failure to refer explicitly to 28 U.S.C. 2107 in the transition sections of the Bankruptcy Reform Act of 1978 was inadvertent. *In re Shannon*, 670 F.2d 904, 906 (10th Cir. 1982); *Andrews* v. *South Dakota Student Loan Assistance Corp.*, 636 F.2d 233, 235-236 (8th Cir. 1980). Thus, the court of appeals in the instant case correctly held that the 60-day rule of 28 U.S.C. 2107 was applicable here, even though the judgment appealed from was entered, and the notice of appeal due, prior to April 1, 1984.

committee note accompanying Rule 8015, however, states that a motion for rehearing does not extend the time for taking an appeal:

> The filing of a motion for rehearing does not toll the time for taking an appeal to the court of appeals from the district court or the bankruptcy appellate panel. * * * Rule 4 F[ed.] R. App. P. does not * * * contain any provision which stays or otherwise alters the time for taking an appeal to the court of appeals when a motion for rehearing is filed under Rule 8015 with the district court or bankruptcy appellate panel.

This comment of the advisory committee is sound and is entitled to weight in interpreting Rule 8015. See 3 Sutherland, *Statutory Construction* § 67.10, at 23 n.3 (4th ed. 1973); cf. *Mississippi Publishing Corp.* v. *Murphree*, 326 U.S. 438, 444 (1946). Petitioners' motion for rehearing accordingly did not extend the time for taking an appeal. See *In re Lovitt*, 757 F.2d 1035, 1038-1039 (9th Cir. 1985).[3]

Petitioners' suggestion (Pet. 22-24) that the court of appeals' dismissal of their appeal violated their due process rights is frivolous. Apart from the fact that due process does not mandate appellate review in civil cases (*National Union*

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[3]There is no merit to petitioners' argument (Pet. 12-13) that Rule 8015's "silence" about the possibility of extending the time for taking an appeal creates "confusion." Only an explicit provision, like that in Fed. R. App. P. 4(a)(4) (concerning appeals from the district courts), has the effect of permitting a motion for rehearing to extend the time for taking an appeal, and petitioners point to no such explicit provision concerning appeals from bankruptcy appellate panels. Nor is there merit to petitioners' reliance (Pet. 16-17) on Rule 9023 of the Rules of Bankruptcy Procedure, which incorporates by reference Fed. R. Civ. P. 59. Rule 9023 is contained in Part IX of the Rules of Bankruptcy Procedure and, as such, is one of the general provisions that applies to trials in bankruptcy matters. The bankruptcy appellate panel was not sitting as a trial court and Rule 9023 thus had no relevance to petitioners' appeal.

v. *Arnold*, 348 U.S. 37, 43 (1954)), petitioners were not required to choose between prosecuting an appeal to the court of appeals and having their motion for rehearing considered by the bankruptcy appellate panel. They were free to pursue both avenues at once by filing a timely notice of appeal to the former and requesting a remand to the latter in the event that it was willing to entertain their motion for rehearing. See *Crateo, Inc.* v. *Intermark, Inc.*, 536 F.2d 862, 869 (9th Cir.), cert. denied, 429 U.S. 896 (1976); *Long* v. *Bureau of Economic Analysis*, 646 F.2d 1310, 1318 (9th Cir.), vacated on other grounds, 454 U.S. 934 (1981).

Finally, there is no merit to petitioners' argument (Pet. 15-19) that their failure to file a timely notice of appeal was excusable because their attorney was misled by the Ninth Circuit's Clerk office about the filing deadline. Even if one were to assume (1) that bankruptcy appellate panels possess the authority (conferred on district courts by 28 U.S.C. 2107) to extend the time for filing a notice of appeal, (2) that petitioners should be deemed to have requested such an extension, and (3) that the reason for petitioners' failure to file a timely notice of appeal amounted to "excusable neglect," the filing deadline could have been extended only for a period of 30 days (28 U.S.C. 2107). Since petitioners' notice of appeal was due on February 25, 1984, a 30-day extension would have run only until March 27, 1984. Petitioners did not file their notice of appeal until April 19, 1984.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Acting Solicitor General

JUNE 1985

DOJ-1985-05